2018 WL 1828350 (Cal.App. 4 Dist.) (Appellate Brief)
Court of Appeal, Fourth District, California,

Fernando MARTINEZ, Plaintiff & Appellant,

v.

Stephen O'HARA; Career Solutions and Candidate Acquisitions; O'Hara Family Trust; Ocre, Inc.; Professional Realty Council, Inc; and Pacific Valley Realty, Inc.;, Defendants & Respondents.

No. G054840.
April 6, 2018.

San Diego Superior Court Case No. 30-2012-00614932
On Review from the San Diego Superior Court Commissioner Carmen Luege, Judge
Presiding Judge Kimberly Dunning, Judge Presiding Judge Gregory Munoz, Judge Presiding

Appellant's Reply Brief

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INTRODUCTION

As a nation, we have spent 250 years to date building this remarkable system of human governance called the Rule of Law. The Rule of Law theoretically allows our citizenry to be treated fairly, no matter who they are, how unpopular they are, what they look like, or how connected their family is to the governing power. This feature itself is an incredible, radical idea as far as societies go. The Rule of Law provides a method to reach similar outcomes in similarly-situated cases which facilitates peaceful resolutions. This itself is another breathtaking feature uniquely associated with sustainable societies. The Rule of Law is one way we align and regulate incentives toward the highest productive function of our society's resources so that we can all row in the same direction for the collective good. The first great effort to have a Rule of Law society etched the 1500-year Roman empire into a reputation as the most tolerant and successful society in history.

Our diligent and more advanced construction of a Rule of Law in the United States allows us to challenge the Roman Empire to become an even greater, more humane, more productive and more dominant society - to unseat the Roman Empire in becoming the greater, and thus greatest, Empire - ever.

Critical to building this inconceivably-valuable national resource is for those persons entrusted to carry it out, including most importantly trial judges, to follow it to the absolute best of their ability. Without proper and good-faith daily enforcement, the Rule of Law is meaningless, and our precious system will deteriorate into the ugliness, violence and inefficiency of anarchy.

These realities make this small matter ideal as a case study. It is a vessel to review three different paths by which different trial judges deviated from the Rule of Law. Understanding why they sometimes do this is critical to preventing it. We

learn as a society from our mistakes, we do our best to find ways to correct them, and we strive for a more perfect union. And in fairness, ownership of those mistakes is not ***6** focused singularly on trial judges. The behavior that triggered all of this controversy, by the litigants and the lawyers, including this lawyer, needs to be acknowledged, studied and corrected as well.

All of the human flaws in this story that led to deviations from our Rule of Law need to be reviewed dispassionately, to further the goal of preventing them in the future and thus allowing our Rule of Law society to work incrementally better, because that is how these things are done: "brick by brick, my citizens, brick by brick," as the celebrated Roman Emperor Publius Aelius Hadrianus - Hadrian - once famously said.

This case provides good fodder because given Respondent's brief, there is so much noise, and so much distracting anger and accusation, it is almost reminiscent (on a smaller scale) of Mabry. Like Mabry, this Court is presented with much frustration by the parties. This Court has another opportunity to ever-so-elegantly assess all of the circumstances and merits and then identify the governing analysis that should prevail in these kinds of situations.

So as against Respondent's marquee contention that Martinez is before the Court merely to "vent his spleen," respectfully, O'Hara and his lawyers are missing the point. True, there is frank criticism of the conduct and decisions of certain trial judges. But if we cannot deal in the truth by being candid with each other, how can we expect to understand our mistakes, much less learn from them and avoid them in the future. Besides, all of the criticism is academic in nature. It is based on the case file. Indeed, for the most part, O'Hara complains about (and curiously catalogues) Martinez's criticisms and then fails to dispute their underlying merits.

Along similar lines, it is true that Martinez, possessing no other explanation for what was received as a uniquely antagonistic fee ruling by the lower court, has waded into the dangerous waters of judicial motivation. O'Hara believes that this is the defining fact toward a conclusion that Martinez is blindly attacking trial judges. He is incorrect. There are plenty of rulings that go against a lawyer without being so noticeably (and surprisingly) antagonistic. Counsel has three other civil cases on ***7** appeal right now and none of those lower court rulings read like the mindless attack of the instant ruling. It is clearly out of the ordinary in terms of dozens if not hundreds of trial rulings that counsel regularly sees and occasionally appeals.

The question of why this trial judge was motivated to light Martinez up is the subject of relevant appellate inquiry, and as Martinez sees it, there is an explanation in the case file. Understanding that motivation and contrasting it to Rule-of-Law principles and methods is a worthy exercise in Martinez's humble opinion.

It is also true as O'Hara points out that this case, narrowly viewed, requires the Court to merely pass on the merits of a fee ruling. The merits will of course be discussed in detail, the many factual errors confirmed and understood, and so forth. On a straight legal analysis, the trial court's ruling represents an abuse of discretion because she barely got any of the facts straight. But this wasn't incompetence; it was intention. An exercise in judicial advocacy, which is blatantly obvious here, by definition means that the trial judge has elected to subordinate legal accuracy.

For his part, Martinez acknowledges that he too could have done better in terms of the optics or diplomacy of his lawyer's performance. But judges are supposed to develop a constitution for litigants and lawyers that behave imperfectly, or even rebelliously. It is a common occurrence at the trial level and certainly not grounds for a trial judge to degrade into advocacy.

Regrettably, Respondent's brief offers several dog-whistle criticisms that reiterate views already in the record but provide little additional insight in terms of helping the Court adjudicate this case. O'Hara refuses to acknowledge, much less discuss - and in certain instances even tries to obscure - the basic, common facts that are so important to fairly and accurately decide the disputed legal issues.

Inasmuch as there were correctable deviations from the law, including principally as Martinez contends a decision in the ultimate ruling to feed the lower court's appetite to engage in judicial advocacy, there is hardly any feature of judicial decision-making that needs more to be understood and disincentivized. Judicial advocacy throws the ***8** whole Rule-of-Law method back into a primitive state of personality, tribalism and power, and those are ingredients that cause societies to fail.

We can do better.

II.

SUMMARY OF FACTS

In the Opening Brief, Martinez offered a standard statement detailing the facts of the case. (AOB 10-14.) In it, several factual realities were established. For one, O'Hara was engaged in a quantum of investor fraud, enough so that he destroyed a swath of his friends and business contacts during the Great Recession in order to finance his retirement.

This is undisputed.

O'Hara was also deeply engaged in a detailed false advertising construct in creating a website and marketing system to lure young job seekers into his orbit with numerous grandiose promises. These representations were objectively false. He sent out 20,000 false advertising emails and was planning to take his system nationally. (See AOB 11-14.)

This is also undisputed.

Finally, the Statement of Facts also establishes that, as an older gentleman facing the increasing challenges of finding sexual partners, he resorted to the tactic of illegally leveraging a low-level employee's survival needs in exchange for sex.

This body of evidence is also undisputed by O'Hara.

However, for his part, Martinez essentially capitulated to that agenda out of financial desperation, even though trading sex for money (even if it is the oldest profession) is illegal in California. But O'Hara's behavior was more egregious than merely becoming an indirect, or perhaps de facto, purchaser of sexual services. He illegally retaliated by terminating Martinez's employment when Martinez ended the sexual aspect of the relationship and then tried to force Martinez to agree to an NDA conditioned on Martinez's need for at least part payment of his last paycheck. (AOB ***9** 14-15.) That was pretty oppressive. No corporate employer would dare to attempt such a brazen move.

Although O'Hara does not dispute these matters, he does characterize this detail as painting a “tabloid picture.” (RB 17.) He also repeatedly protests that Martinez is personally attacking him. (RB 9, 12, 17.) [1]

1 O'Hara does take issue with one factual assertion. (RB 17.) Martinez argued that O'Hara agreed to shut down the fraudulent (CSCA) website. (AOB 12.) O'Hara says the record does not support this. (RB 17.) The trial judge made a finding that the website was fraudulent. (3 A 1898.) That the website contained a mountain of fraud cannot be seriously disputed. (AOB 12-13.) To moot the need for a formal injunction, O'Hara promised the Court that he took the website down. (3 A 1803-1804.) To the extent that O'Hara now builds a narrative around the idea that Martinez is overreaching as a result of this alleged record inaccuracy, his single citation to support it is wrong and his narrative must necessarily collapse. (RB 17-18.)

However, these are the facts of the case, and they are undisputed.

III.

OUTCOME OF THE LITIGATION

In the Opening Brief, Martinez offered an inventory of the trial outcomes. (AOB 23.) O'Hara claims in various iterations that the litigation was not successful, and in certain instances, tries to obscure what the real outcome was. Thus, an accounting of the net result of this litigation accounting for O'Hara's points and responses is set forth below.

It starts with correcting one of many O'Hara's mistaken assertions. He says that the case went to trial on only two claims. (RB 37.) The case went to trial on four claims. Despite three expensive and time-consuming rounds of demurrers and motions to strike, no cause of action had been eliminated. (Compare 3 A 1902 to 2 A 805.) Of five causes pled, O'Hara first capitulated by paying the labor claim before trial. (2 A 930.) Of the remaining four, the fraud claim was eliminated mid-trial by the lower court; there was a jury verdict on the FEHA claim; and a bench verdict on the two injunctive causes of action. (RB 37; 3 A 1867, 1897.)

***10** A. Human Behavior Outcomes - O'Hara

As a matter of human behavior, the extensive damage O'Hara caused to others during the Great Recession is done. It could not be corrected with this litigation. The most Martinez could do on this front was to document it. (See AOB 11-12.)

As a salesman by trade, if the lines between permissible and impermissible advertising were unclear, this misunderstanding was surely corrected by this litigation. O'Hara ultimately committed to terminate the fraudulent website. (3 A 1803-1804, 1898.) [2]

2 Another one of O'Hara's many factual mistakes is his claim that there were not multiple victims. (RB 24.) O'Hara sent out 20,000 email solicitations, thus committing by definition 20,000 17500 violations, and he planned to send many more. (2 A 1060-1061.) Another mistake is O'Hara's contention that Martinez initially sought $400,000 in fees. (RB 23, 27.) At all times Martinez sought 1/3 of that. (2 A 927; 2 A 1149 [RoA 554:10].)

On the sexual misconduct front, it is doubtful that O'Hara will resort in the future to such endeavors given their potential expense. Flights to Nevada are dramatically less costly than litigating the legality of pressured sexual encounters.

B. Trial Judges

1. Judge Gregory Munoz

In the Opening Brief, Martinez documented concerns about the functionality of a retired trial judge, Hon. Gregory Munoz. This would have been irrelevant to the fee motion except that it was counsel's perception during oral argument that discussion of this issue triggered Judge Luege to generate the advocacy opinion she issued.

O'Hara catalogues this list of criticisms in an effort to portray Martinez as needlessly attacking the judiciary (RB 14-16), but this does not hold water since the Munoz problem affected the ruling under review. To this, and after his high-profile protest that Martinez is needlessly criticizing Munoz, O'Hara says nothing about the merits. He does not address or dispute the problematic dynamics with Judge Munoz's professional competency on display in the discovery dispute; nor does he contest the ***11** assertion that Judge Luege was in fact triggered by discussion of these events at oral argument.

This latter observation is important because, from Martinez's viewpoint, the entire structure of the fee ruling by Judge Luege is built around an improper motivation - a product of judicial advocacy in electing to defend Munoz's honor by shooting the messenger - which utterly defeats the governing principles of a Rule-of-Law legal system.

But returning to Judge Munoz specifically, the point Martinez would like to impress on this Court is that there is a point in time when senior judges, no matter how dedicated, fair or responsible they were in their prime (as is the consensus for Judge Munoz) cannot handle the work load of a sitting trial judge's docket. [3] Detection systems should be in place before a catastrophe like the one here occurs, or a string of them (inevitably) occur once a trial judge finds the papers too burdensome to read. Martinez asks in all sincerity: if he had not taken the step of filing the 2013 Writ, how long would this have gone on. Was anybody watching the till?

3 After the Writ was adjudicated, and even though it was denied, it was something Judge Munoz noticed and took seriously. His rulings after the Writ, before he retired and the case was transferred, were noticeably more detailed and accurate. (See 3 A 1132 [RoA 229].) O'Hara can scream all day long that Martinez is attacking the judiciary, but sycophants don't make the system any better. The fact is that, after the criticism documented by the Writ, Judge Munoz returned to better practices. Martinez is not here to impugn the man or the judiciary but merely to establish that this particular judge was in fact having work capacity issues toward the end of his judicial career. That problem had real effects: it altered a ruling by another judge, some three years later. It has provoked another two years of appellate litigation. Given the potential ripple effect of a single dysfunction in the process of ruling as shown here, it is important to have timely detection systems by the monitoring body. As relevant here, and because she did not really understand the back story, Judge Luege should have resisted the desire (but did not) to champion Judge Munoz because it came at the expense of the integrity of her ruling.

All involved in this appeal agree that the work load for a sitting trial judge is formidable. (See AOB 21, fn. 1; RB 13, fn. 3.) In Judge Munoz's case, there appears to ***12** have been a failure of detection. Maybe the monitoring system worked given the subsequent retirement. Maybe Martinez's Writ played a part in that; maybe it was a coincidence. But if the former did play a part, and to the extent that such efforts help to alert the Court to be cognizant of how demanding a trial judge's docket can be on a senior judge, unpleasant as the subject may be for everyone involved and as unpopular as this may make Martinez and his lawyer, it does add value to an understanding of how imperfections in our legal system arise.

And of course, to the extent that a sitting jurist is triggered to champion a colleague, although the motivation may be laudable, when it results in a ruling that is intentionally imbalanced, it doesn't adhere to the greater purpose of Judge Luege's existence as an important servant in our Rule-of-Law paradigm.

2. Judge Kim Dunning

During the case, as noted in the Opening Brief, Martinez observed Judge Dunning to be systematically ruling against Plaintiffs. The observation was anecdotal in nature and observed solely over a single day's motion docket, and admittedly, it is not strictly relevant to the fee motion in question.

However, Martinez felt, and still feels, that it was disconcerting enough to bring to this Court's attention. Notably, Martinez does not feel the problem lies with Judge Dunning. Judge Dunning is not a rogue actor. If she is methodically batting down plaintiffs, it is counsel's experience that this is a directive that comes from this Court, respectfully.

***13** O'Hara has nothing intelligent to offer here. He again elects to dismiss it as another needless attack on the judiciary. (RB 16.) Martinez does not know enough about the aerial dynamics by which plaintiff cases, or maybe potential class action cases, are evaluated by the local Orange County judiciary, but it hardly requires further discussion to say that trial judges who are inclined, or implicitly directed, to focus on finding flaws in plaintiff presentations, and are systematically rejecting them, is not a healthy or fair way of running a Rule-of-Law legal system. [4]

4 As noted in the brief infra, 0“Hara's appeal to dog-whistle criticisms about plaintiff class actions inadvertently admits that he thinks there is hostility to them in Orange County. Thus, despite his claim that this is misguided criticism, O'Hara is simultaneously and rather blatantly trying to harness what must be his own perception that the Orange County judiciary harbors some amount of hostility to class actions.

3. Commissioner Carmen Luege

Martinez's concerns about judicial advocacy by Judge Luege were noted in the Opening Brief and mentioned above. As will be established more fully below, judicial advocacy is at work here. The reason this is detectable, and indirectly confirmed by O'Hara, is that he repeatedly re-states what Teeple Hall and Judge Luege's existing criticisms were, without dealing with the facts that undermine those positions. O'Hara's brief is essentially an exercise in doubling down on the points made below, by adding an additional layer of critical characterization to them, coupled with a staggering amount of repetition. [5]

5 It appears that O'Hara repeated each of the salient points he is making on appeal an average of five times.

However, neither of these two tactics actually advance a common understanding of what is important for purposes of decision in this appeal. His brief merely reiterates the established ammunition in the event this Court decides to write its own judicial advocacy opinion. [6]

6 In that case, and intending a modicum of levity, this Court could save itself the drafting time by simply cutting and pasting the lower court's ruling and adding the words “Affirmed” at the bottom.

However, if the Court wants to reach some level of objective truth before deciding what legal conclusion to attach to it, the Court - unlike O'Hara - will have to address and dispose of some difficult facts.

The first difficult fact is that it is effectively undisputed - or at least not addressed with any thoughtfulness - that Judge Luege was triggered to hostility by the ***14** Judge Munoz flap and this resulted in an opinion that is structurally composed as an exercise in judicial advocacy.

Even if the Court agrees with some of Commissioner Luege's conclusions (which seems tough given that her characterizations are almost-uniformly premised on mistakes in the facts), and even acknowledging the deference the law affords to lower court fee rulings, if this Court concludes that the Commissioner undertook to write this opinion by succumbing to an appetite for judicial advocacy, it must reverse. There is no path by which a Court of Appeal could, consistent with Rule-of-Law principles, validate a lower court ruling whose structural approach consists of first deciding to impose the harshest possible outcome and then discarding or even contorting the established legal analysis to achieve it. (See Neder v. United States (1999) 527 U.S. 1, 8-9; People v. Molina (2000) 82 Cal.App.4th 1329, 1334-1335.)

C. Case Outcomes

In the Opening Brief, Martinez took inventory of the actual case outcomes. (AOB 23.) O'Hara offers a volume of commentary basically calling the overall litigation wasteful. (RB 18, 20, 36, 51.) However, this conclusion suffers from a number of points and facts O'Hara declines to address.

1. Fraud Claim

This argument was dismissed by the trial judge without being permitted to go to a jury. To say that the decision to bring a fraud cause of action was wasteful seems inappropriate given the magnitude of fraud that O'Hara was indisputably engaged in. (See AOB 12-13.)

2. False Advertising/17200/17500

O"Hara claims that Martinez tried to file a "mega-class action 'cash in' for himself and others." (RB 7.) Salacious. However, counsel has been in the legal business for 25 years and has never heard the term "mega class action." That said, if resistance to class actions in Orange County appears to be some sort of dog whistle possibly related to why Judge Dunning appeared to be systematically batting down ***15** class/complex-designated plaintiff cases, then this Court should appreciate that this case was not within the perceived abuses O'Hara is appealing to.

Certain kinds of damage-based class actions, in some instances involving credit cards and so forth where plaintiff lawyers seek and are awarded more than $1M in fees in court-approved settlements, may be understandably unpopular among a pro-business Orange County community. Here, however, counsel sought to simply stop O'Hara's well-documented, and nationally-focused, false advertising machine by obtaining injunctive relief. (See AOB 12-14; 2 A 826-846.) Such action at most results in hourly pay. (See Code Civ. Proc., § 1021.5.) There was no prospect of a million-dollar fee. This Court did not certify the class, but O'Hara nevertheless ultimately abandoned the enterprise as a result of this case. (3 AA 1803-1804.)

Given O'Hara's lawyers' misunderstanding, or intentional mischaracterization, of this aspect of the litigation, O'Hara foregoes any meaningful discussion of whether there is a societal benefit to halting false advertising, especially by someone who is planning to send out hundreds of thousands of false email advertisements on a national scale. He does label it "cracking a peanut." (RB 21.) Reasonable minds can differ on whether O'Hara had the means to inflict real damage on a national scale. Regardless, Business & Professions Code section 17500 still sits on the books. By any fair assessment, this was a standard false advertising case. Martinez tried to litigate the matter this way and unsuccessfully tried to overcome the onerous Prop 64 class certification hurdle. The point is that there was nothing "mega" about this case. Martinez does not appreciate O'Hara pandering to this Court's perceived prejudices in some sort of greedy-plaintiff-lawyer narrative.

That said, after the debacle with certain actually-unethical LA plaintiff lawyers, their knee-jerk 17200 filings based on administrative citations, and the resulting disbarments and Prop 64 legislation, it appears that traditional, real 17200/17500 actions are not as viable because of the imposition of traditional 382 class action certification requirements. That seems unfortunate given the daily inundation of junk ***16** email that requires an entire country to constantly screen, identify and eliminate a relentless onslaught of unwanted electronic communications.

Notwithstanding, the net effect here, even with the failed certification effort, was that Martinez's 17500 action resulted in the early termination of O'Hara's budding national false advertising enterprise. It is disingenuous for O'Hara to portray his capitulation to stop committing false advertising as wasteful. Furthermore, that capitulation did not come until after four years of litigation. In terms of who should pay for Martinez's effort to get to that point, traditional allocation-of-risk concepts in the law typically place that burden on the wrongdoer, not the victim. (See Civ. Code, §§ 3521, 3520, 3517.)

3. Labor Code

In the original 2012 suit, Martinez claimed $2,250 in Labor Code violations, consisting of $750 in outstanding wages and $1,500 in penalties. (1 A 32.) About a month after the lawsuit was filed, O"Hara paid $975 leaving a balance of about $1,300. (1 A 180, 320; 2 A 1110.)

Four years later, and a couple of days before the 2016 jury panel was set to be seated, the defense paid another $1,300 in order to moot that issue. (2 A 930, 1110.) Thus, by definition, Martinez obtained a recovery on the labor cause of action, albeit in gross a small amount of money.

O'Hara makes an effort to obscure the reality of these events. He makes dozens of references - variously characterizing it as untried, moot, paid before trial, and unadjudicated - that the wage claim was something less than it actually was: capitulation. (2 AA 919; see, e.g., RB 22, 30-31, 31, 43, 45, 48, 49, 50, 52; Graham v. DaimlerChrysler (2004) 34 Cal.4th 553, 570-571; Buckhannon v. West Virginia (2001) 532 U.S. 598, 633-634.) Moreover, it was capitulation on the eve of trial which required plaintiff to prosecute the claim through the four-year length of the system. (2 AA 919.)

***17** If the Court accepts that the 17200/17500 injunctive causes of action were legitimate claims to bring, even if 382 certification did not succeed, then it cannot in good conscience deny the wage claim as something that should have been prosecuted in small claims court. (See RB 26, 50.) Given a legitimate decision to bring a 17500 cause of action, one in which actual relief was obtained, Martinez was then required to litigate all claims in superior court.

Furthermore, the wage claim was closely related to the sexual harassment claim. Martinez's termination of the sexual relationship prompted O'Hara's decision to illegally deny his wages. Martinez was not at liberty to split the wage claim off as a separate small claims action. (See, e.g., Harris v. Grimes (2002) 104 Cal.App.4th 180, 188.)

Surely this Court can understand that there is a certain minimum threshold of required time to prosecute any claim to the point of trial: investigation, complaint, demurrers, case management, discovery, dealing with opposing counsel, trial filings, trial preparation. (2 A 1077-1078.) To dismiss the wage claim as too small to merit relief in fees because it was litigated in superior court ignores the procedural requirements Martinez was required to adhere to in this case.[7] (See Graciano v. Robinson (2006) 144 Cal.App.4th 140, 150; Hayward v. Ventura Volvo (2003) 108 Cal.App.4th 509, 512.)

7 O'Hara claims this case was “grossly misevaluated” (RB 44, fn. 10), and it is true counsel was none too pleased about a sexual harassment verdict that only came in at only $8K, but O'Hara never explains what quick-and-easy legal mechanism - that Martinez should have known in advance of discovery - would have revealed to him that he should reject O'Hara's own “extreme exposure” characterization, would have enabled Martinez to deconstruct and injunctively shut down O”Hara's fraudulent advertising enterprise, rectify the sexual misconduct that Martinez was claiming to be rape, and get his wages paid. (See 1 A 10-37.)

Furthermore, to dismiss Martinez's opinion that the required minimum effort reflected about 10% of the overall legal effort (see RB 51) is not to just reject the opinion of the most knowledge person about this issue, to wit an experienced lawyer, ***18** but to reject the opinion of the only person with personal knowledge of how much relative burden the wage claim presented in comparison to all of the other claims. (See 2 A 1071.)

Finally, to expect a numerical or systematic billing method to apportion the effort associated with the wage claim, or any claim, is unrealistic. It would skyrocket the cost of litigation to prepare fee applications with such precision. Similarly, with due respect to those who think that block billing is too imprecise, time will eventually reveal what all real-time practicing attorneys privately know to be true: block billing is necessary in order to maintain lawyer sanity.

For the record, counsel's estimate of 10% was fair for the wage claim in what appellate counsel, looking back down at trial counsel, considers to be a reasonable explanation tendered to the lower court. (2 AA 1076:2-1078:21.)[8]

8 This assertion is conditioned on replacing the term “wage claim” with “sex claim” at page 1078, lines 11-12.

4. Sexual Harassment.

The jury awarded Martinez a modest $8,080 in damages for this claim. (2 A 807, 854.) O'Hara compares this to Martinez's $250,000 compensatory request to the jury, and matching request for punitive damages, to say that counsel's positions were outlandish. (RB 8, 30, 44.) He provides no authority that this is a proper consideration on a subsequent fee application. Weighing against it are standard competency obligations that create an expectation for plaintiff counsel to press for the highest plausible recovery. (See People v. Fitzgerald (1973) 29 Cal.App.3d 296, 310.)

Martinez's theory of damages was based on the idea if the sex was illegal, even if consensual at that moment, then a jury might assess damages in a qualitatively different way than just looking at the logistic consequences for Martinez upon being terminated. (See People v. Alvarez (1997) 178 Cal.App.4th 999, 1007; People v. Harrison (1989) 48 Cal.3d 321, 331-332; 2 A 931)

***19** On punitive damages, O'Hara's entire fraudulent construct, built around the grandiosity of a recruiting company that he projected to, but did not actually, exist in a brick-and-mortar reality, was legitimate grounds for seeking punitive damages. (Civ. Code, § 3294, subd. (c)(3); see AOB 12-14.) A request for a lx multiplier of compensatory damages is hardly controversial for such a situation. (BMW v. Gore (1996) 517 U.S. 559, 580-582.) O'Hara characterized his own conduct as creating "extreme exposure." (1 A 171; 3 A 1278.)

In short, O'Hara can point out that the jury did not agree with Martinez's theory of damages but the logical price of a jury argument that does not fly should be limited to the fact that Martinez did not get the requested award. To cite this as a basis to deny fees for the victory that was achieved, especially when counsel's theory of damages was plausible given the facts of the case and existing legal principles, is another dog whistle appeal to the greedy-plaintiff-lawyer narrative. O'Hara is again inadvertently conveying his belief that the Orange County courts are hostile toward plaintiffs, for the observation is not otherwise a logical component of disciplined legal analysis in determining how much of a legal effort is compensable.

Recovery of attorney's fees are not governed by a 1717 greater relief/prevailing party paradigm. They are statutory pursuant to the FEHA laws. A plaintiff with a non-nominal recovery is presumptively entitled to fees under the Government Code and interpretive rules laid down by the Chavez opinion. Martinez's damage requests to the jury is hardly a proper analytical basis to unseat that presumption.

The Court should adjudicate this case with the benefit of an accurate understanding of the dynamics in the lower court and the outcomes on net.

***20** IV.

THE TRIAL COURT ABUSED ITS DISCRETION BY INTENTIONALLY MAKING MISTAKES IN THE LEGAL ANALYSIS IN SERVICE TO A JUDICIAL ADVOCACY AGENDA.

On the wage claim, the trial judge found that O'Hara paid the outstanding wages early on and that the outstanding Labor Code penalty (paid by O'Hara just prior to trial) did not constitute wages; accordingly, Martinez was not a prevailing party on that cause of action. (2 A 1106.)

O'Hara did not pay either the wages or the penalty until after Martinez retained counsel and initiated litigation. (1 A 2 AA 930; 1 AA 11.) His capitulation on the eve of trial defines an exercise in victory. Furthermore, while O'Hara and the trial court both emphasize that full payment was received without a trial, O'Hara resisted liability on the basis that Martinez was an independent contractor. (1 AA 171, 181; 2 AA 726; 3 A 1277-1278; 3 AA 1788.) Thus, for the trial court (and O'Hara) to be dismissive of the idea that it might have required $30,000 to $40,000 to prosecute a disputed wage claim

through the length of the superior court system, with O'Hara kicking and screaming the entire time, is to intentionally disbelieve something that was in reality factual. (RB 11; 2 A 1077; see 2 AA 1154 [reflecting 641 docket entries].) [9]

9 Why is it always the plaintiff being accused of over-litigating a case, when the defense, and in particular this defense, is equally equipped and far more incentivized to engage in such abuses. For example, O'Hara's business construct involved four entities. He elected to require litigation against all of them throughout the case until he capitulated at trial that they were all his alter ego. (2 A 805; 2 A 1110.)
Indeed, on a broader note about which party was doing the driving in terms of the cost of litigation, O'Hara points out that Martinez amended the complaint five times, without seeming to have any appreciation for the fact that these amendments were necessitated by O'Hara's extensive seriatim demurrer filings. (RB 19, 36; 2 A 1116-1117, 1120, 1127-1128 [RoA 11-21, 59-67, 164-173].)

O'Hara next argues that penalties, as distinct from wages, cannot support a fee award. But first he cites the trial court's intentionally mistaken belief that ***21** Martinez was not the prevailing party simply because O'Hara capitulated to pay the wages before the case came up for trial, as if a plaintiff can only prevail by securing a verdict. (RB 39; 2 A 1106.) The point is so utterly lacking in merit among any sophisticated legal mind that Martinez sees this as an example of intentional intellectual dishonesty being generated as an undesirable by-product of judicial advocacy.

It is also hard to understand how either O'Hara or the trial judge could, in any sort of honest reading of Ling, see it as authority in support of a view that penalties based on failure to pay wages are not included in section 218.5 's enforcement purview. Ling basically says that when the underlying action was for non-payment of wages, the continuing wages accruing as a section 203 penalty can be the subject of a fee award. (Ling v. P.F. Chang's (2016) 245 CaI.App.4th 1242, 1261; see also Lab. Code, § 203 [‘upon non-payment of wages, an employee's wages continue to accrue as a penalty.’) Again, the trial court appears to have made intentional mistakes at the knowing expense of legal accuracy in service to a higher agenda of ruling against Martinez for his perceived political offenses.

As O'Hara implicitly acknowledges (by forthrightly citing Autozone), the remaining debate seems to be whether penalties for denials of meals and rest breaks are considered wages, not whether continuing wages based on non-payment of wages are wages. (In re Autozone (N.D.Cal.2016) 2016 WL 4208200, *6-7.)

O'Hara points out that the IRS does not treat money obtained as a penalty as compensation for purposes of several federal laws that anchor certain employer obligations and insurance benefits on an employee's wages. (See IRS Memorandum 201522004; IRS Information Letter 2016-0026.) The Service takes the understandable view that for purposes of its insurance and withholding calculations, this money is in fact a penalty - a fine calculated by the metric of wages, designed to punish the employer for not timely compensating an employee. (Ibid.)

***22** But that's not how California sees it. California has statutorily decided that wages “continue” for an employee if not timely paid (up to a month), even if the employee did not continue working. (Lab. Code, § 203.) Martinez understands and respects the Service's substance-over-form view of these issues, but California has the right to define for itself what constitutes wages and it has decided by legislative fiat that section 203 penalties are additional wages. [10] (Lab. Code, § 203.)

10 O'Hara also proposes to characterize what the case was ‘really about,’ that the fee shifting causes of action were an “afterthought,” and that Martinez's “true objectives” were non-compensable 17200/17500 claims. (RB 25, 28.) The operative pleading defines a case's scope. (Hutton v. Fidelity (2013) 213 Cal.App.4th 486, 499.) The Fifth Amended Complaint included a cause of action for unpaid wages and sexual harassment. (2 A 805). Counsel attested in the papers and honestly on the

spot that these claims comprised 10% and 23% of the total work respectively (2 A 931, 1071, 1078), and thus the case was by definition "about" these issues to this 1/3 extent.

A. The Trial Court's Comparison to Chavez Defines an Abuse of Judicial Power.

The trial court cited the $870K fee request in Chavez v. Los Angeles (2010) 47 Cal.4th 970 as grounds to find Martinez's $144K fee request - which required a jury trial - as comparably excessive in its magnitude. (2 A 1107.)

O'Hara repeats the trial court's idea by similarly citing qualitative features of Chavez. (RB 31-32.) But what they are both silent about is the $726,000 difference between the two requests. It's as if objective numbers do not matter to them. This too marks another example of the trial court's mindless antipathy toward Martinez. The trial judge intentionally analyzed a quantitative issue - an allegedly excessive request for fees - by resorting to citation of qualitative features.

When a trial court abuses its discretion, it may engage in several types of flawed thinking. The Court may lose control over its exercise of power. (Westside Community v. Obledo (1983) 33 Cal.3d 348, 355.) Its logic may fall outside the bounds of reason. (People v. Benavides (2005) 35 Cal.4th 69, 88.) Its argument may be arbitrary, whimsical or capricious. (***23** People v. Linkenauger (1995) 32 Cal.App.4th 1603, 1614; People v. Branch (2001) 91 Cal.App.4th 274, 282; see People v. Giminez (1975) 14 Cal.3d 68, 72.) It may exceed the limitations of the legal principles governing the subject. (Westside Community, 33 Cal.3d 348, 355.)

Here, the trial judge was motivated to rule against Martinez in what must be the intoxicating effects of wielding the power to break the law, in order to reach a desired result. The lower court relied on the Chavez comparison certainly knowing it was a totally - numerically - imbalanced comparison. Yet it forged forward with this comparison riding some sort of superseding objective that subordinated her obligations as a jurist to rule analytically and dispassionately.

For the trial court to not even acknowledge the mathematical difference between Chavez's $870,000 fee request and Martinez $144,000 request reveals that she ruled without being able to responsibly wield the extraordinary power to make legal findings. Basically, the trial court engineered the result she wanted, regardless of the law, by intentionally analogizing to a case that even a first-year law student would understand to be distinguishable.

And for what. Because Martinez dared to question the competency of one of her colleagues? As the record stands before this Court, Judge Munoz's competency issues at the described moment are undisputed. Yet, the Orange County judiciary as Commissioner Luege perceives it is so fragile and so intolerant of any suggestion of an unpopular truth - in contravention of Canons of Judicial Performance that require judges to have immovably thick hides, see Canon 3[11] - that when Plaintiff formalized the perception and she apparently saw this material in her "complete review of the file," (2 A 1106), this triggered her Henry-the-Eighth exercise against Martinez.

11 Code of Judicial Conduct, Canon 3 states, "A judge shall be faithful to the law regardless of partisan interests, public clamor, or fear of criticism, and shall maintain professional competence in the law,"

In short, Commissioner Luege's comparison to Chavez without addressing the objective, numerical, quantitative difference between the two fee requests ***24** provides a window into a way of thinking that defines what it means to abuse judicial power. (Fine v. Fine (1946) 76 Cal.App.2d 490, 495-496; 2 A 1094-1095.)

V.

THE LOWER COURT MADE MORE MISTAKES IN SEEKING OUT WAYS TO CRITICIZE MARTINEZ FOR RECONSTRUCTED BILLING RECORDS.

The trial court issued more criticism about counsel's decision to partially use billing reconstruction as a method of reaching a reasonable figure for the fee application. However, as was customary throughout the opinion, in her zeal for advocacy, she made additional mistakes because she operated based on a misunderstanding of how billing reconstruction works.

O'Hara reiterates these criticisms, which revolve around two factual accusations repeated ad nauseam: that Martinez billed several 15-hour days, which the lower court felt was implausible, and that Martinez billed 25 hours on one particular date, which was received as a logistic impossibility and thus proof of Martinez's alleged overbilling. (2 A 1106; RB 11, 25, 29-30, 38, 47, 52; see 2 A 950 [No. 266])

However, some days required extensive work on a deadline. (See 2 A 943 [Billing Entry 101], 2 A 1123 [RoA 103-105], see Contemporaneous Augment Motion ("AUG"), Exs. 81-83, AUG 1-129; 2 A 945 [Billing Entries 144-145], 2 A 1131 [RoA 214-217], Exs. 91-92, AUG 678-828.)

Others were the aggregation of a well-known large number of tasks. (See 2 A 940 [Billing No. 7] [19.0 hours billed for all tasks, including investigation, antecedent to filing of original complaint], 1 A 10-37; 2 A 940 [No. 21] [18.5 hours billed for preparation of 11 sets of (tedious) custom-tailored written discovery requests].)

***25** Martinez asks the Court to quickly review the observable filings that represent key examples of the lower court's and O'Hara's alleged 15-hour-day overbilling criticisms. It can determine for itself whether 15.8 hours for one set of opposition papers and 15.9 and 14.5 hours respectively over two days (for a total of 30.4 hours) for a second set of opposition papers is implausible for that quality of work. (See 2 A 943 [Entry 101], 2 A 1123 [RoA 103-105], Exs. 81-83, 1 AUG 3-12, 13-30, 31-129 [reflecting 124 pages of briefing and supporting materials]; see also 2 A 945 [Entries 144-145], 2 A 1131 [RoA 214-217], Exs. 91-92, AUG 678-828 [reflecting 147 pages of opposition filings, 30.4 hours billed].) [12]

12 With all due respect to the trial court's and O'Hara constant attempts to portray Martinez's counsel as some sort of schlocky, slippery plaintiff's lawyer, this firm has been privately noted by a number of credible observers to put out some of the highest quality appellate work in the State. (See, e.g., Smith, et al. v. Schwarzenegger, et al. (9th Cir. 2015) Case No. 15-17155, Docket 63.)

Indeed, the time entry for the July 8, 2013 opposition-filing effort reflects that it was one of those days where meeting the filing deadline required "hundreds of citations" and work "all day, all night." (2 A 945 [Entry 145].)

Other filings also represent an extensive bulk of detailed legal work underlying the subject billing entries. (2 A 944 [Entry 119], 2 A 1128 [RoA 178, 183-185], Exs. 84-87, 1 AUG 134-249; 2 A 945 [Entry 138], Exs. 88-90, AUG 250-677.)

***26** For other tasks, Martinez assigned a formula to an associate to measure the time to prepare various motions and other work in the case file. (2 A 1084.) As noted in the opening brief, this was performed consistent with the principles that the appellate projects use to calculate compensation for panel attorneys. (AOB 33 [13]; see 1 A 90; 2 A 1084.) [14] The panels assign time estimates by looking at the length and complexity of the papers themselves. Thus, when reconstruction is employed, a single motion or filing gets assigned a certain number of compensable hours. Even if a motion took three days to write, one date will be entered in the time log representing all the hours it took to write that motion. This explains why a single date may exceed the 24-hour threshold because in reality, the work was performed over several days but the assignment of time was fixed based on the date of the document. (See 2 A 950 [Entry No. 266]; Ex. 95, AUG 829-872.)

13 There were several citations in the AOB to "2 A 302-315." The correct citation is 2 A 939-952, as pages 302-315 were the Adobe .pdf references.

14 If any of the assigned justices are unfamiliar with panel billing (at least as it was practiced in the 1990's), it might consider asking O'Hara's appellate counsel about it, for these lawyers are surely familiar with criminal appellate work to make such a big deal out of harmless error in a civil case. (RB 10, 30-31, 34-35, 52.)

In looking at the specific allegedly-impossible entry, the opening brief on the certification appeal, Attorney Fonner's initial draft required 30.8 hours, with another 25 hours (over several days, obviously) contributed by Attorney Pavone for a total of 65.8 hours to finalize and file the AOB, CCIS, and the Appendices. (2 A 950 [Nos. 259-265, 266]; see Ex. 95, AUG 829-872.) This is not a controversial amount of time for this kind of project. [15]

15 Back in the panel days, you'd generally get credit for about 2 hours of work for each finished page of text. The first AOB, relating to class certification, contained 34 pages of text, which returns a presumptive figure of 68 compensable hours. 65.8 hours billed comes in slightly under. For comparison sake, this brief is 24 pages of text and will be complete in about 51 hours, contemporaneously billed. So whether you reconstruct at 2 hours/page or bill it contemporaneously, you usually end up in about the same place. It's a paradigm that has withstood the test of time.

The 25.0 entry wasn't even reconstructed. It's too high on a block-billing basis for a single entry but to make a legal finding that it is impossible this time was incurred because of the date, and thus find the overall bill inflated, is to ignore the very work product that necessarily requires that kind of time. (See Martinez v. O'Hara (2014) CoA Case No. G050710 [AOB, 10/21/14 docket entry]; Ex. 95, AUG 829-872.)

In summary, if the Court actually drills down to the legal work underlying the allegedly unreliable billing entries that form the basis of the trial court's and O'Hara's larger accusation that the billing was inflated (2 A 1106, RB 10-11, 18, 23, 27-31, 38, 45-48, 51-52), their theory falls apart.

Put in appellate terminology, the factual underpinnings supporting the adverse conclusions assigned by O'Hara and the lower court to Martinez's billing are clearly erroneous. (See People v. Overstock (2017) 12 Cal.App.5th 1064, 1091.)

***27** These examples further document the lower court's superimposition of its judicial advocacy agenda over accurate legal work. It appears she did not look at the underlying filings; she skimmed the bill, criticized a few easy targets within it and then figured that was enough to label Martinez's lawyer a liar in terms of billing.

But she picked the wrong lawyer to accuse of this. Had she actually looked at the underlying filings in her so-called complete review of the case file, she would have known that this firm does the work. But she did not.

Accordingly, the trial court's mistakes premised on its superficial review of the billing entries form additional reasons to conclude that the trial court's overall opinion represents an abuse of discretion.

VI.

THE DOCTRINE OF HARMLESS ERROR DOES NOT SOLVE THE PROBLEM OF NUMEROUS ERRORS IN THE TRIAL COURT'S RULING.

O'Hara contends the judgment can be affirmed citing the doctrine of harmless error. (RB 10, 30-31, 34-35, 52.) He cites no authority to establish that this is the correct analysis on the appeal of a motion in a civil case, with the traditional civil

analysis allowing an appellate court to affirm if the judgment can be defended as ultimately correct for an independently valid reason, one different than the incorrect aspect of the one the lower court employed. (See RB 34-35.)

In this case, O'Hara seems to be saying that even if the trial court was wrong to cite Ling in denying compensation on the fee claim, the allegedly-problematic billing records provide an independent legal basis to reject the entire application. (RB 51-52.) However, as established above, the lower court got the facts wrong on the entries she cited to support that conclusion, so the independent-basis theory of affirmance falls apart.

Moreover, once again, all of this controversy is in service to the greater point that a $144K bill is excessive for a case that spanned four years. This figure represented 1/3 of the overall effort against a steadfastly resistant defendant and time itself; and Martinez unilaterally took another third of the bill off the table as a matter ***28** of billing judgment to account for the moderate nature of the relief obtained. (See 2 A 931, ¶ 8.) The fact that both the trial court and O'Hara project mortification about a $144K bill represents either pretense or ignorance about the modern cost of litigating against a resistant defendant. The former possibility is ten times as likely as the latter.

O'Hara's legal team's feigned outrage of $144K as some sort of aberrant fee request is contradicted by the existence of the Chavez case and common legal practice. This Court undoubtedly sees mid-6-figure fee applications all the time. As a side project in 2013, your undersigned counsel used to harvest all of the SD, OC and SF trial court tentative rulings and also routinely noted such requests. Now and then there was a 7-figure one.

In short, no amount of cherry picking the subject bill for large entries to criticize (and making mistake after mistake after mistake about them, including a blatant error in falsely accusing Martinez of double billing the appellate costs, 2 A 1107, AUG 657, 830) can change the reality that although Martinez utilized a less common method to construct part of his fee request, it was legally permissible and it did work: the requested fee is proportionate to the overall legal effort O'Hara required on defense. The billing record tendered represents a reasonable - and upon scrutiny of the challenged entries, reasonably accurate - summary of that effort.

For these narrow legal reasons, namely that the lower court made too many factual mistakes in the underlying formation of her resultingly-incorrect adverse opinions, the case should be remanded for a re-determination of fees.

CONCLUSION

The lower court made numerous factual errors. Its ruling cannot be considered a responsible exercise in discretionary adjudication with so much foundational error. Moreover, these mistakes were not the product of it being incapable of understanding the law or applying the facts to them. It was because she intentionally decided to let her master for this motion be not the law, but an ***29** adversarial agenda to rule against one party regardless of it. This is why there are so many mistakes in the opinion: because accuracy was not the goal: outcome was.

Submission to such an appetite reveals that the lower court did not wield power responsibly. Such an opinion is structurally reversible because, a fortiori, it abandons analytical discipline in favor of political or interpersonal objective. We have a political system: the legislature. The judicial system is supposed to run on facts, evidence and rules, not personality, popularity or majority. Commissioner Luege's decision to not respect this distinction constitutes a failure of restraint.

An enduring legal system reaches outcomes by minimizing the politics of identity or arguably rebellious behavior of a litigant. Indeed, that is a prime feature of what allows it to endure. It processes criticism, frustration, protest and dissent for the usefulness that it may serve in terms of improving its function, and thus translates all energy, positive and negative, systematically and unemotionally into an appropriate, Rule-of-Law based outcome all can respect and peacefully accept. (See, e.g., Hustler Magazine v. Falwell (1988) 485 U.S. 46, 53-55.)

When practiced correctly, removed of the understandable (if not acceptable) human appetites that sometimes subvert the axioms that make it operate correctly, we have and will continue to build a legal system that is more fortified, more majestic, more tolerant, more just and ultimately worthy of enough deference and respect by the citizenry to last another 1250 years, and ideally long after that.

Regrettably, this incredible governance system failed in this particular instance. This occurred for a lot of reasons, but principally because the lower trial court became distracted by side issues and did not assiduously respect the axiomatic principles that govern the issue it was tasked with adjudicating.

***30** That said, for whatever human and behavioral flaws this Court assigns to the various actors in this story, including your undersigned's, we don't throw each other out with the bathwater. We try again.

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